DEVON M. HURST

IBLA 83-677 Decided August 18, 1983

Appeal from decision of Utah State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. U MC 148064 through U MC 148068.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory and failure to comply is deemed conclusively to constitute an abandonment of the claim by the owner and renders the claim void.

2. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment

   The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976), is imposed by the statute itself. A matter of law, it is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

3. Administrative Procedure: Adjudication--Evidence: Generally--Evidence: Presumptions--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Claim--Mining Claims: Abandonment

   Although at common law, abandonment of a mining claim can be established only by evidence demonstrating that it was the claimant's intention to abandon it and that he in fact did so, in enacting the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976),

Congress specifically placed the burden on the claimant to show, by his compliance with the Act's requirements, that the claim has not been abandoned and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon his claim may not be considered in such cases.

4. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Evidence: Presumptions--Evidence: Sufficiency--Mining Claims: Abandonment

There is an established legal presumption, which is rebuttable, that official acts of public officers are regular. But the presumption is overcome if contrary evidence is presented, and the case is then in the fact-finder's hands free from any rule. Where BLM has declared appellant's mining claims abandoned and void for failure to record labor affidavits timely, and appellant adduces evidence in support of his contention that the documents were, in fact, timely filed, preponderance of the evidence decides the case. Appellant in this case has not carried his burden of proof by showing incontrovertibly that BLM received the documents.

APPEARANCES: Devon M. Hurst, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Devon M. Hurst, for himself and his coowner, 1/ has appealed the decision of the Utah State Office, Bureau of Land Management (BLM), dated April 29, 1983, which declared the unpatented Happy Surprise #1 through #5 lode mining claims, U MC 148064 through U MC 148068, abandoned and void for failure to file on or before October 22, 1979, evidence of annual assessment work or a notice of intention to hold the claims, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2.

Appellant included copies of the proofs of labor for the Happy Surprise #5 mining claim, as recorded in San Juan County, Utah, for the years 1978 through 1982, stating that a copy of each proof of labor had been transmitted to BLM in the appropriate year. Appellant also stated that responsibility for filing proofs of labor for the Happy Surprise #1, #2, #3, and #4 claims is with one R. J. Noonan.

Examination of the case file discloses that the transmittal letter of October 12, 1979, which transmitted the notices of location, amended notices of location, a map, and the required service fees made no reference to a proof of labor. The case file contains a proof of labor for Happy Surprise #5 claim for 1980 and 1982 only. There is no proof of labor for Happy Surprise #1, #2, #3, or #4 for any year.

1/ The claims appear to be owned by Devon M. Hurst and Delores Hurst.

[1] Under section 314 of FLPMA, the owner of a mining claim located on or before October 21, 1976, must file a notice of intention to hold the mining claim or evidence of the performance of annual assessment work of the claim in the proper BLM office on or before October 22, 1979, and on or before December 30 of each calendar year thereafter. When it wrote and passed this law Congress made this requirement mandatory, not discretionary, and failure to comply is conclusively deemed to constitute an abandonment of the claim by the owner and renders the claim void. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980).

[2, 3] The Board responded to arguments similar to those presented here in Lynn Keith, supra. With respect to the conclusive presumption of abandonment and appellant's argument that the intent not to abandon was manifest, we we stated:

> The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).
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> * * * Appellant also argues that the intention not to abandon these claims was apparent, saying, in essence, that the act of filing the certificates of location for record in BLM and the payment of recording fees on the last day on which notices of intention to hold, or evidence of assessment work could be submitted, clearly indicated that the claims were not abandoned. At common law, evidence of the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. Farrell v. Lockhart, 210 U.S. 142 (1908); 1 Am. Jr. 2d, Abandoned Property §§ 13, 16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacted legislation, the Congress has specifically placed the burden on the claimant to show that the claim has not been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption of abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered. [Emphasis in original.]

Lynn Keith, 53 IBLA at 196-97, 88 I.D. 371-72.

[4] There are various presumptions which come into play when an appellant alleges timely transmittal of an instrument but BLM has no record of its receipt. On one hand, there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. See, e.g., Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Bernard S. Storper, 60 IBLA 67 (1981); Phillips Petroleum Co., 38 IBLA 344 (1979). On the other

hand, there is the presumption that mail properly addressed and with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. See, e.g., Donald E. Jordan, 35 IBLA 290 (1978). When these two presumptions have come into conflict, the Board has generally accorded greater weight to the former. See David F. Owen, 31 IBLA 24 (1977). We believe that the public policy considerations dictate that greater weight be given to the presumption of regularity over that accorded the presumption that mail, duly addressed, stamped and deposited, is delivered.

Thus, where BLM states it did not receive the instrument, the burden is on the appellant to show that the instrument was, in fact, received timely by BLM. See H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981).

Appellant's unsupported statement that he did transmit the 1979 proof of labor with the copies of the notices of location to BLM does not overcome the presumption of regularity. It is the receipt of the instrument which is critical. See 43 CFR 1821.2-2(f).

Although appellant asserts that the documents were actually mailed, the regulations define "file" to mean "being received and date stamped by the proper BLM office." 43 CFR 1821.2-2(f); 43 CFR 3833.1-2(a). Thus, even if the proof of labor was inadvertently left out of the envelope transmitted to BLM, that fact would not excuse appellant's failure to comply with the cited regulations. Filing is accomplished only when a document is delivered to and received by the proper BLM office. Regina McMahon, 56 IBLA 372 (1981); Everett Yount, 46 IBLA 74 (1980). The filing requirement is imposed by statute, and this Board has no authority to waive it. Lynn Keith, supra.

Appellant may wish to consult with BLM about the possibility of relocating these claims.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Douglas E. Henriques
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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R. W. Mullen
Administrative Judge